United States Court of Appeals

for the Second Circuit

APPELLANT'S PETITION FOR REHEARING

NO. 75-1154

ORIGINAL

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee-Respondent,

vs.

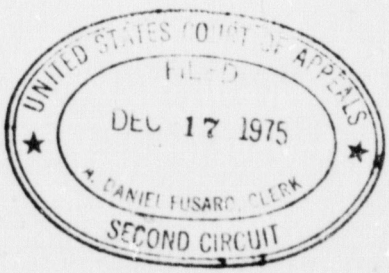
EDWARD ZUBER, et al,

Appellant-Petitioner.

On Appeal from the United States

District Court, Southern District of New York

PETITION FOR REHEARING
OF APPELLANT-PETITIONER, EDWARD ZUBER



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IN THE UNITED STATES COURT OF APPEALS

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PETITION FOR REHEARING

TO THE HONORABLE JUDGES: MOORE, FEINBERG and OAKES OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT:

Pursuant to Rule 40 of the Federal Rules of Appellate Procedure, Appellant, EDWARD ZUBER, petitions this Court for rehearing in the above-captioned case.

The order of this Court in the above-captioned case was filed December 1, 1975. This petition is filed within the time provided therefor by Rule 40, Federal Rules of Appellate Procedure.

I

STATEMENT OF THE ISSUES PRESENTED[1]

1. Whether this Court misapprehended the posture of the evidence below.

2. Whether this Court misapprehended the law as to the likelihood that a co-defendant will testify in a future separate trial.

II

ARGUMENT

A. THE OPINION OF THIS COURT MISAPPREHENDED THE POSTURE OF THE EVIDENCE BELOW.

The crucial issue relating to the Appellant ZUBER was the question of whether he had the requisite knowledge of the manipulative nature of the underlying scheme. The posture of the evidence below permitted certain inferences as to that knowledge. However, direct contradicting evidence was available from co-defendants Segal and Finkelstein.

1. Segal.

The proferred testimony of co-defendant Segal relates to two key areas of testimony. The first deals with the question of when Zuber and Segal met

[1] This Petition for Rehearing is addressed solely to the question of whether the trial court erred in failing to grant a severance to Defendant-Appellant ZUBER.

for the first time. The second concerns an alleged telephone conversation between co-defendant Michael Clegg, speaking in California in the presence of Zuber, with co-defendant Segal (alleged to be in New York at the time).[2] The date of Segal's first meeting with Zuber bears heavily on the transaction with furrier Alan Grant, which formed the basis for the sole count upon which Appellant ZUBER was convicted. That transaction took place on January 10, 1970. Segal alone, and no other witness, was in a position to rebut the trial testimony of Michael Gardner that he and Segal had first met in late December or early January. Segal's testimony would be that it was "well after" January 10th when he first met with co-defendant Zuber. (J.A. 1118.)[3] The impact of the proferred Segal testimony, along with that infra, is clearly exculpatory and crucial to Appellant ZUBER's defense. It blunts the adverse inference to be drawn from the testimony of Michael Gardner that Zuber and Segal met on or about the very day of their transaction with furrier Alan Grant. The thrust of the Segal testimony is that Zuber could not have learned of the underlying fraud scheme from

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[2] This Court made reference to that testimony in its Summary of the Facts in its reference to Clegg handing the phone to Zuber who allegedly conversed with Segal at that time. (Slip Opinion p. 845.)

[3] J.A. refers to Joint Appendix.

co-defendant Segal. Similarly, Segal's testimony as to the alleged Clegg-Segal telephone call was equally crucial. If that testimony of Michael Clegg is believed, it once again places Zuber in communication with co-defendant Segal prior to January 10th, thereby raising an inference that Zuber could have learned of the manipulative scheme from co-defendant Segal. Segal alone could have testified that he was in Florida during the entire Christmas holiday period when Clegg alleges he made the telephone call in question to Segal at his office in New York. (J.A. 593, 595.)

The combined impact of the two areas in which Segal could have testified on Zuber's behalf are dramatic. Without his testimony, the record appears to establish contacts between Zuber and Segal during the period of late December to early January, the only period in which Zuber is alleged to have had any active participation in the manipulative scheme. Segal, and Segal alone, could have established at a separate trial that he never met nor communicated with Appellant ZUBER until "well after" the period of time preceding the transaction with furrier Alan Grant.

2. Finkelstein.

The link between Zuber and co-defendant Segal

was co-defendant Finkelstein. If Zuber did not learn of the manipulative scheme from Segal, he could only have learned of it from Finkelstein. In fact, the jury must have relied upon this very inference, as did the Government in its brief:

> ". . . and given the joint activities of Zuber and Finkelstein in Pioneer stock, the jury would have had firm basis to infer that Finkelstein, indeed, had told Zuber about the full manipulative scheme, just as Segal had told him." (Government's Brief, p. 51.)

The Government has thus framed the issue as squarely as possible. Without Finkelstein's testimony, the jury could only infer that since Zuber and Finkelstein operated together, Zuber must have known all that Finkelstein knew. Finkelstein, and Finkelstein alone, was in a position to rebut that inference by positive direct testimony that he never told Zuber of the manipulative scheme.

It is on this point that this Court apparently made its most serious misapprehension as to the posture of the evidence below.

> "Had Finkelstein testified, for example, his testimony would have been subject to

"substantial damaging impeachment by grand jury minutes which would have revealed Finkelstein's knowledge of Segal's manipulative designs, and hence tended to incriminate him." (Slip Opinion p. 853.)

The crucial point here is that there is nothing inconsistent about Finkelstein's knowledge of Segal's manipulative designs and what Finkelstein may have told Zuber about them. At a separate trial, Finkelstein would have been prepared to admit knowledge of Segal's manipulative designs. The crux of his testimony, and the crucial point, is that Finkelstein was prepared to state under oath that he never told Zuber of Segal's manipulative scheme. Therefore, the cited grand jury testimony is not inconsistent with Finkelstein's proferred exculpatory testimony of Zuber.

B. THIS COURT MISAPPREHENDED THE LAW IN CONSIDERING THE LIKELIHOOD THAT A CO-DEFENDANT WOULD TESTIFY AT A SEPARATE TRIAL.

One apparent base of this Court's affirmance of the trial court's denial of the motion to sever deals with the likelihood of subsequent guilty pleas and actual testimony of a co-defendant at a subsequent, separate trial. (Slip

Opinion p. 853 - 854.) This Court apparently determined that a defendant must show a strong likelihood that his co-defendants would plead guilty and subsequently testify at a later trial. That is not the posture of the law. What is required is that a moving defendant show persuasive ground for the claim that he needs a co-defendant's evidence; that the need must almost certainly go unsatisfied in a joint trial; and that there is substantially greater likelihood of his using him if they are tried separately. United States v. Gleason, 259 F.Supp. 282, 284 - 285 (S.D. N.Y. 1966.)

In Gleason, Judge Frankel set forth most concisely the dispositive answer to the Government's claim that a co-defendant may not, in fact, testify at a subsequent trial:

> "It may be questioned, first of all, whether the prediction about another defendant's disposition to testify -- even where the prediction rests upon the advice of that defendant's counsel, who may not have unqualified reasons for sharing confidences with the prosecution -- is 'properly the Government's to interpose.' United States v. Echeles, 352 F.2d 892, 898 (7th Cir. 1965). Passing this, as the argument of the motion demonstrated, the matter is surely in the realm of speculation.

"If Pitkin is tried separately and first, he may plead, or be found, guilty. He may choose to testify in his own defense. He may, as the law presumes, be acquitted, whether or not he takes the stand. One way or another, it is possible that he will come to lack a subsequent basis for invoking the privilege. Cf. Namet v. United States, 373 U.S. 179, 188-189, 83 S.Ct. 1151, 10 L.Ed.2d 278 (1963)." (Gleason, at p. 284.)

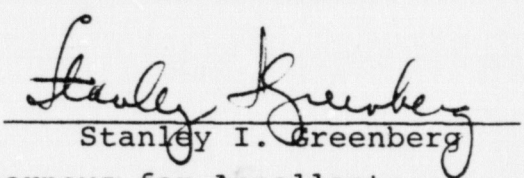
III

CONCLUSION

WHEREFORE, for the foregoing reasons, it is respectfully submitted that the original order of affirmance herein be VACATED AND THAT THIS COURT REVERSE THE CONVICTION OF APPELLANT ZUBER.

Respectfully submitted,

KIRSCHNER & GREENBERG

By 
Stanley I. Greenberg

Attorneys for Appellant-Petitioner EDWARD ZUBER.

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

I am a citizen of the United States and a resident of the county aforesaid; I am over the age of 18 years and not a party to the within above entitled action; my business address is 10844 Ventura Boulevard, North Hollywood, California. On December 15, 1975, I served the within

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on the persons interested in said action by placing true copies thereof enclosed in sealed envelopes with postage thereon fully prepaid, in the United States post office mail box at North Hollywood, California, addressed as follows:

John S. Siffert, Esq.
Assistant U. S. Attorney
United States Courthouse
Foley Square
New York, New York 10007 (2 copies)

Petitioner claims the 3-day mailing privilege under Rule 27, Federal Rules of Appellate Procedure

I certify (or declare) under penalty of perjury that the foregoing is true and correct.

Executed on December 15, 1975 at North Hollywood, California.

Esiquia Gonzales

Esiquia Gonzales